93-674

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GARY A. PALKOVICH,

Petitioner

versus

UNITED STATES POSTAL SERVICE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

IS THERE A PRIVATE RIGHT OF ACTION UNDER THE POSTAL REORGANIZATION ACT, AND DID PALKOVICH STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR "REWARDS DENIAL?"

DID THE FIRST AMENDED COMPLAINT STATE A CAUSE OF ACTION UNDER THE FEDERAL TORT CLAIMS ACT?

DID THE POSTAL SERVICE EXCEED OR ABUSE ITS POWER IN ENACTING A REGULATION WHICH VIOLATES CONGRESSIONAL INTENT AND IMPROPERLY VESTS UNFETTERED DISCRETION IN REGARD TO REWARD PAYMENTS IN POSTAL SERVICE EMPLOYEES?

HAS THE POSTAL SERVICE'S CHIEF POSTAL INSPECTOR BEEN BOTH ARBITRARY AND CAPRICIOUS IN EXERCISING HIS SO CALLED DISCRETION AND DENYING PALKOVICH'S RIGHT TO PROCEDURAL DUE PROCESS?

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STATEMENT OF JURISDICTION

Judgment by United States Court of Appeals for the Eleventh Circuit was entered on July 23, 1993.

Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by virtue of 28 U.S.C. § 1254.

CITATIONS AND VERBATIM QUOTATIONS

5 U.S.C. § 2302(b)(8):

(b) Any employee who has authority to take. . .any personnel action, shall not, with respect to such authority--

. . .

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule or regulation...

(B) any disclosure to the. . .employee designated by the head of the agency to receive such disclosures, information

which the employee or applicant reasonably believes evidences--
(i) a violation of any law, rule, or regulation...

28 U.S.C. § 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

28 U.S.C. § 1339:

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

28 U.S.C. § 1346:

(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2671 et seq.:

As used in this chapter and sections

1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

39 U.S.C. § 401:

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

. . .

(8) to settle and compromise claims by or against it;

. . . and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on if its functions or the exercise of

its specific powers.

39 U.S.C. § 404:

(a) Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

. . .

(8) to offer and pay rewards for information and services in connection with violations of the postal laws, and, unless a different disposal is expressly prescribed, to pay one-half of all penalties and forfeitures imposed for violations of law affecting the Postal Service, its revenues, or property, to the person informing for the same, and to pay the other one-half into the Postal Service Fund...

39 C.F.R. § 233.2:

(c) The Chief Postal Inspector or his delegate is authorized to pay a reward to any person who provides information leading to the detection of persons or firms who obtain, or seek to obtain, funds, property, or services from the Postal Service based upon false or fraudulent activities, statements or claims. The decision as to whether a reward shall be paid and the amount thereof shall be solely within the discretion of the Chief Postal Inspector or his delegate and the submission of information or a claim for a reward shall not establish a contractual right to receive any reward. Postal employees assigned to the Postal Inspection Service or the Law Department are not eligible to receive a reward under this section for

information obtained while so employed. The Chief Inspector may establish such procedures and forms as may be desirable to give effect to this section.

STATEMENT OF THE CASE

Course of Proceedings and Dispositions in District Court and Circuit Court of Appeals.

The initial pro se complaint in this cause asserted a cause of action arising from the failure of the Postal Service to pay a reward to Palkovich in connection with assistance he rendered in uncovering unlawful activities at the post office branch where he worked, the facts of which will be detailed *infra*. In Count II, a cause of action under the "Whistleblowers Act," 5 U.S.C. § 2302(b)(8), was asserted.[1]

A motion to dismiss the initial

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[1] An "amended complaint" was filed but was not acted upon.

complaint was filed by the Postal Service along with a memorandum in support. Palkovich filed a response and moved to amend the complaint.

The district court entered an order dismissing both counts of the initial complaint, determining that no causes of action were asserted upon which relief could be granted. (APPENDIX-C, at C-1, C-2 and C-7). Permission was given to Palkovich to file an amended complaint. The reasoning of the district court will be addressed *infra* at pages 8-9.

Palkovich filed his First Amended Complaint, asserting a claim under the Federal Tort Claims Act and a denial of due process under the Fifth Amendment to the U.S. Constitution. The First Amended Complaint also asked the district court to review the decision of an arbitrator

which had entered a ruling in connection with Palkovich's termination from employment with the Postal Service. However, Palkovich later abandoned that count.

The Postal Service moved to dismiss the First Amended Complaint and filed a memorandum in support. Palkovich filed a responsive memorandum. The district court dismissed the First Amended Complaint, again finding that no cause of action was asserted upon which relief could be granted. (APPENDIX-B, at B-2 and B-3). Palkovich appealed to the U.S. Court of Appeals for the Eleventh Circuit. The court of appeals affirmed the dismissal with no opinion. (APPENDIX-A, at A-1). This petition followed.

Statement of the Facts

As this case was decided at the pleadings stage, all facts set forth in the First Amended Complaint must be taken as true.[2]

While an employee of the Postal Service, in mid-1988, Palkovich observed discrepancies at the main Hollywood, Florida Branch of the Postal Service in the amounts he saw being collected as fees for bulk mailings by certain of his fellow coworkers, for certain customers. Palkovich then first began reporting his observations to his Postal Service superiors but was rebuffed.

Thereafter, in reliance on the Postal Service's reward bulletin

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[2] *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079 (1972).

(Notice 96) and based upon Palkovich's continued observation of what he regarded as bulk mail fraud, Palkovich acted in accordance with his perception of the requirements of the Postal Service set forth in federal statute and regulations. Palkovich then decided to report his observations to the office of the Postal Service Postal Inspector. Subsequently, Palkovich assisted as an informant for the Postal Service in an almost two-year investigation by the Postal Inspector which then followed, leading to the return of several federal criminal informations or indictments. The criminal charges related to unlawful gratuities, conspiracy and bulk mail fraud at the Hollywood facility of the Postal Service.

The First Amended Complaint further

stated that when informing for the Postal Service for two years, Palkovich specifically relied upon the Postal Service's obligation to pay a reward as set forth in 39 U.S.C. § 404, 39 C.F.R. § 233.2 and "Bulletin 96" which was at all relevant times posted in the lobby of the Hollywood, Florida Post Office and virtually every U.S. Postal Facility throughout the United States. Palkovich's risky involvement led to the convictions and the collection of substantial fines, penalties and restitution payments exceeding 4.5 million dollars. The Postal Service, despite repeated demands by Palkovich, has refused to account nor to pay Palkovich any reward whatsoever, making a final determination to deny Palkovich's claim in December of 1991.

In the first count of the First Amended Complaint, Palkovich asserted a claim under the Federal Tort Claims Act. This claim was based on the wrongful and negligent denial of Palkovich's reward claim and the Postal Service's failure to hold a fair investigation and hearing with respect to the reward claim. Palkovich asserted that the Postal Service owed a duty to him, based on statute and regulation, the fact that Palkovich was allowed and encouraged by the Postal Service to act for two years on behalf of the Postal Service in his "informing" activities, and the fact that the Postal Service relied upon Palkovich's acts in "informing."

Palkovich further asserted that the Postal Service had wrongfully and negligently failed to properly

investigate, to hold a hearing upon, and/or to pay a reward to Palkovich after he sought such actions from the Postal Service. Such failure by the Postal Service "constitutes negligence as to [Palkovich's] foreseeable expectations of payment of a reward, causing [Palkovich] as a direct and proximal result monetary injury and loss." Finally, in Count I Palkovich asserted that when informing for the Postal Service, he relied on the Chief Postal Inspector properly exercising his statutory and regulatory duties to investigate and determine without bias Palkovich's reward claims. When the Chief Postal Inspector failed to properly and fairly investigate and make such determination, the Postal Service breached its duties under 28 U.S.C. §§ 1346 and 2671 et seq., which duty the

Postal Service owed to Palkovich.

In Count II of his First Amended Complaint, Palkovich asserted the same facts as those supporting Count I, and alleged that the conduct of the Postal Service constituted a denial of due process guaranteed under the Fifth Amendment to the U.S. Constitution. Palkovich asserted a property right or entitlement as a result of his informant services for the Postal Service, and asserted that he was given no fair and objective procedure nor standard by which his claim of a reward could be determined.

In the Order dismissing the initial complaint, the district court determined that 39 U.S.C. § 404 empowers the Postal Service to pay rewards but does not require it to do so, and that

39 C.F.R. § 233.2 provides that payment of rewards is discretionary with the Chief Postal Inspector. (APPENDIX-C, at C-4 and C-5). Therefore, according to the district court, there can be no action to enforce payment of any reward. (APPENDIX-C, at C-5). In the final order which dismissed the First Amended Complaint, the district court adopted its earlier order. (APPENDIX-B, at B-2). The court determined that Palkovich had failed to meet the jurisdictional prerequisites of the Federal Tort Claims Act (which was pleaded in the First Amended Complaint), since the court found no duty on the part of the Postal Service. (APPENDIX-B, at B-2 and B-3). With respect to the claim of denial of due process (Count II of the First Amended Complaint), the court

determined that no private right of action exists, and because the granting of a reward is made discretionary under 39 C.F.R. § 233.2, the court determined that Palkovich has no property interest to assert and thus has not been deprived of any property without due process of law. (APPENDIX-B, at B-3).

Basis for Federal Jurisdiction.

Under 28 U.S.C. § 1339, the United States District Court (here the court of first instance) has original jurisdiction of any civil action arising under any Act of Congress relating to the Postal Service.

ARGUMENT

39 U.S.C. § 404 gives the Postal Service the power to pay rewards to persons who furnish information and services in connection with violations of the postal laws. The Postal Service enacted a regulation which permits it to exercise unfettered discretion in the payment of rewards for certain offenses. Palkovich relied on the statute, the regulation and the reward notice in rendering substantial "informant" assistance to the Postal Service which resulted in several convictions and substantial fines.

There is no case law which resolves the questions presented in this case; i.e., whether an "informant" can enforce his right to a reward in federal court,

based upon a private right to action arising out of 39 U.S.C. §§ 401 and 404, whether in the alternative the reward claimant has a cause of action under the Federal Tort Claims Act, whether the regulation enacted by the Postal Service is unreasonable and thus a nullity, and whether Palkovich was denied due process in the handling of his reward claim.

Legislative history and statutory construction support Palkovich's arguments on a private right of action, as does case law generally. The district court failed to consider Congressional intent in denying a private right of action. The cases relied upon by the Postal Service are completely inapposite to a suit by a private citizen seeking that to which he is entitled by virtue of his substantial "informant" assistance to

the Postal Service and his perception of entitlement to a reward pursuant to statute, regulation and posted reward notice.

As to Palkovich's claim under the Federal Tort Claims Act, he should be given an opportunity to prove that the Postal Service acted wrongfully or negligently in handling his reward claim. He properly notified the Postal Service of his claim, which was finally denied two months before he filed suit. The discretionary function exception is inapplicable under the controlling law and the facts of this case.

The Postal Service exceeded or abused its power when it enacted 39 C.F.R. § 233.2, because that regulation unreasonably gives sole discretion in the payment of rewards to informants in

connection with fraudulent criminal conduct. There are no standards to be applied, no criteria to be met, and no means for a reward claimant to assert and pursue a claim. The law does not permit such unfettered discretion and the regulation should be vacated.

Palkovich established a property right or entitlement by virtue of his reliance on entitlement to a reward and he was clearly denied due process in the handling of that claim by the Postal Service.

The only forum which can provide a remedy to Palkovich is the district court. The public interest demands such a forum.

CONCLUSION

The United States Court of Appeals having decided to affirm, without opinion, the district court's dismissal, is an important question of federal law, which has not been, but should be, settled by the United States Supreme Court. Based on the foregoing special and important reasons, the PETITIONER respectfully requests that the United States Supreme Court grant a writ of certiorari to review the United States Court of Appeals decision.

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APPENDIX-A

JUDGMENT FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT:

Before KRAVITCH and BIRCH, Circuit Judges, and JOHNSON, Senior Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that

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plaintiff-appellant pay defendant appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 23, 1993

For the Court: Miguel J. Cortez, Clerk

APPENDIX-B

FINAL ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA:

ORDER

THIS CAUSE has come before the Court upon the defendant's motion to dismiss the plaintiff's amended complaint. The Court, in a previous order, dismissed the first complaint for failure to state a claim upon which relief can be granted. The Court directed plaintiff to file an amended complaint, if he desired, by June 2, 1992. Plaintiff filed an amended complaint on June 5, 1992, and then filed another amended complaint on June 10, 1992. The plaintiff did not serve the defendant until June 17, 1992. On June 24, defendant filed its second motion to

dismiss to which plaintiff should have responded no later than July 14, 1992. The response was filed on July 16, 1992.

The Court has been more than tolerant of plaintiff's failure to abide by the local rules regarding timeliness, service, and other procedural matters. The Court deems that plaintiff's responses are timely filed but notes for the record the lack of diligence exhibited in this case.

Substantively, the plaintiff has once again failed to file a complaint which states a proper cause of action. The plaintiff has attempted to seek compensation under a statute that affords him no relief. When the Court granted leave to amend, it did not intend for plaintiff to use that leave to reassert the same cause of action that had already

been dismissed.

The court refers to the parties to the order of May 26, 1992, and incorporates that order herein. No tort has been alleged here because no duty existed on the part of the defendant. In addition, as outlined in defendant's motion, the plaintiff has failed to meet the jurisdictional prerequisites under the FTCA. Because there was no duty to pay, there could not have been a "negligent failure to pay." Accordingly, Count I of the amended complaint must be dismissed.

Moreover, because no private action exists and because the granting of a reward is discretionary, the plaintiff has no property interest to assert and thus has not been deprived of any property without due process of law.

Thus, Count II of the amended complaint must also be dismissed.

The plaintiff states that he has abandoned Count III of the amended complaint and, therefore, Count III is also hereby dismissed.

The Court has reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that the defendant's motion to dismiss be GRANTED. This case is hereby dismissed in its entirety. The plaintiff's motion to certify the May 26, 1992, order as appealable is DENIED as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 19th day of August, 1992.

[Signature]

JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

APPENDIX-C

ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA:

ORDER

THIS CAUSE has come before the Court upon the defendant's motion to dismiss the complaint.

Count I

Plaintiff's complaint contains two counts: 1) "Rewards Denial" pursuant to 39 U.S.C. § 404 and 39 C.F.R. § 233.2, and 2) violations of the "Whistleblowers Act," 5 U.S.C. § 2302(b)(8). The thrust of defendant's motion to dismiss is that the Court has no subject matter jurisdiction to hear this cause because no private cause of action exists pursuant to these statutes, or

alternatively, because the statutes do not apply to the Postal Service, Thus, the defendant has made a motion to dismiss the case for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In fact there is no claim for which relief may be granted.

A complaint should not be dismissed unless it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957). The allegations of the claim must be taken as true. Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079 (1972). Taking the allegations of plaintiff's complaint as true, there still remains no cause of action or claim upon which relief can be

granted.

The defendant maintains that no cause of action exists pursuant to the Postal Reorganization Act (PRA). Glenn v. United States Postal Service, 939 F.2d 1516, 1519-1520 (11th Cir. 1991); Marshall v. Gibson's Products, 584 F.2d 668, 677 (5th Cir. 1979). The Glenn case, while not directly on point, stands generally for the proposition that several sections of Title 39 do not imply a cause of action. Thus, the case is instructive but not necessarily controlling. The logic of Glenn, that nothing in Title 39 implies a private cause of action, would seemingly apply to the rewards provision as well as the other provisions of the statute.

Accordingly, the defendant asserts that the Court has no subject matter

jurisdiction over this cause. The Plaintiff in response concedes that he has found no case under the statute.

39 U.S.C. § 404, as defendant states, empowers the Postal Service to offer and pay rewards but the language does not indicate that it must give any rewards. § 404 is a general provision outlining many specific powers of the Postal Service, not just the power to give rewards. It states "(a)...the Postal Service shall have the following specific powers, among others: ... (8) to offer and pay rewards for information ... in connection with violations of the postal laws....to pay one-half of all penalties and forfeitures...to the person informing..."

Furthermore, 39 C.F.R. §233.2 clearly delineates that payment is

discretionary.

> The decision as to whether a reward shall be paid and the amount thereof shall be solely within the discretion of the Chief Postal Inspector or his delegate and the submission of information or a claim for a reward shall not establish a contractual right to receive any reward.

The decision to pay a reward, by statute, is discretionary and thus no "right" to receive a reward exists. Therefore, because there is no duty to pay, there can be no action to enforce payment. Accordingly, pursuant to the above discussion, Count I is hereby dismissed.

Count II

The defendant contends that the Postal Service is an independent branch of the federal government. 39 U.S.C. § 201. 39 U.S.C. § 410(a) states that "no Federal law dealing with public or Federal ... officers [and] employees

...shall apply to the powers of the Postal Service." Moreover, 5 U.S.C. §§ 103, 104 & 105 specifically exclude the Postal Service from its definitions of executive agencies. Thus, in § 2302 (the whistleblower statute) an "agency does not include the Postal Service, Accordingly, the Court has no jurisdiction over the Postal Service for "whistleblower" claims because the service is "neither specifically named as a covered entity nor is it an 'agency' subject to the provisions of § 2302." (Defendant's Brief at 6)

Similarly, defendant asserts that plaintiff has no cause of action under 5 U.S.C. § 704 (review of agency action) because 39 U.S.C. § 410(a) states "...no Federal law...<u>including the provisions of chapters 5 and 7 of title 5</u>, shall apply

to the exercise of the powers of the Postal Service." (emphasis added).

The Court has reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that the defendant's motion to dismiss the plaintiff's complaint be GRANTED. The defendant's motion for extension of time to reply is DENIED as moot. The plaintiff may file an amended complaint on or before June 6, 1992. Failure to file an amended complaint which properly asserts a valid cause of action will result in dismissal of this cause.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 26th day of May, 1992.

[Signature]

JOSE A GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE